IN THE SUPREME COURT OF GEORGIA

CASE No. _____

SIERRA CLUB, INC.
Petitioner

v.

GEORGIA PUBLIC SERVICE COMMISSION
Respondent

&

GEORGIA POWER COMPANY
Intervenor - Respondent

PETITION FOR WRIT OF CERTIORARI

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COMES NOW the Sierra Club, Inc. and petitions this Court for a Writ of Certiorari to the Georgia Court of Appeals.

This case concerns who should pay the ever increasing $7.6 Billion to clean up Georgia Power Company's ("Georgia Power's") toxic, leaking coal ash ponds after decades of unsafe and imprudent coal ash disposal practices: Georgia Power itself and/or Georgia Power's existing and future customers via higher electric bills.

Pursuant to O.C.G.A. § 46-2-25(b), Georgia Power can only recover costs from its customers via higher electricity rates if it demonstrates that the costs sought are "just," "reasonable," and prudently incurred. *Georgia Power Co. v. Georgia Public Svc. Comm.*, 196 Ga. App. 572, 576-77, 396 S.E.2d 562 (1990). If Georgia Power's coal ash remediation costs were "incurred as a result of 'imprudent action or inaction or . . . are unreasonable, excessive or unlawful [they] are disqualified'" from rate recovery. *Id.* (citations omitted).

In this case, however, the Georgia Public Service Commission ("Commission") simply failed to consider or even address the issue of whether Georgia Power was imprudent in its coal ash disposal practices, and whether Georgia Power was thus disqualified from recovering coal ash remediation costs from its customers. Indeed, the Commission never grappled with or addressed the culpability issue with any of the witnesses, nor in any of its orders, which the Commission admits when it asserted before the Court of Appeals that the Commission need not

"identify every argument and all evidence that it is not adopting." Commission Br. at 23.

Just last year, in a case on all fours with this case, the Supreme Court of North Carolina concluded that Duke Energy's imprudent coal ash handling practices were a relevant and necessary consideration in allocating coal ash remediation costs between the utility and its customers. *State ex rel. Utilities Comm'n v. Stein,* 375 N.C. 870, 851 S.E.2d 237 (2020). This Court should grant certiorari and similarly review the matter of whether the Commission's failure to consider Georgia Power's imprudent coal ash handling practices constituted arbitrary and capricious, reversible error. If so, this Court, like the North Carolina Supreme Court in *Stein,* should reverse and remand the decision of the Commission so the Commission can undertake an evidentiary inquiry into Georgia Power's coal ash handling practices and determine whether Georgia Power should bear some or even all of the coal ash costs.

But here, the Court of Appeals affirmed the lower decisions allowing recovery of 100% of the coal ash cleanup costs from Georgia Power's customers even though there was unrebutted evidence in the record demonstrating that the coal ash costs were necessitated by Georgia Power's decades-long imprudent and unreasonable coal ash storage and disposal.

This case is of great concern, gravity, and importance to the public, Rule 40, both because of the staggering sums alone—over half a billion dollars for the first installment out of a total $7.6 Billion --and because by affirming the decision below in a single page decision, the Court of Appeals implicitly holds that as a matter of law it is "just and reasonable," within the meaning of O.C.G.A. 46-2-25(b), for the Commission to completely ignore Georgia Power's imprudent and unreasonable conduct in awarding costs incurred as a result of that imprudence. This is inconsistent with O.C.G.A. 46-2-25(b), inconsistent with the decision in *Georgia Power Co.*, 196 Ga. App. 572 (1990), and left unchecked will become the next Plant Vogtle money pit.

STATEMENT OF THE CASE

Sierra Club, Inc., brings this Petition because the Commission committed reversible error by allowing Georgia Power to recover from its captive monopoly customers an initial and precedent establishing $525,000,000 first installment to clean up and close Georgia Power's unlined and leaking toxic coal ash ponds. Georgia Power's recovery of this first installment reflects the entirety of Georgia Power's initial remediation costs and the first recovery of what is expected to exceed $7.6 Billion in total coal ash remediation costs. Georgia law only allows Georgia Power to recover costs from its customers if the increased rate or charge is "just and reasonable." OCGA § 46–2–25(b). Georgia law prohibits Georgia Power

from recovering "[c]osts incurred as a result of 'imprudent action or inaction or [which] are unreasonable, excessive or unlawful.'" *Georgia Power Co.*, 196 Ga. App. 578 (1990) (citations omitted).

The Commission's decision to allow Georgia Power to charge its captive customers the entirety of the first installment to clean up the toxic coal ash ponds was erroneous because the Commission failed to inquire into, examine, or consider Georgia Power's history of imprudent and unreasonable coal ash storage and disposal, and whether Georgia Power's coal ash costs were the result of that conduct. *Id.* Yet evidence that Georgia Power's coal ash costs were the result of Georgia Power's history of imprudent, unreasonable, and illegal coal ash disposal is in the record, unrebutted and was squarely before the Commission. This evidence includes but was not limited to:

a) the unrebutted report and findings of a Georgia registered expert geologist explaining that Georgia Power had for decades disposed of its coal ash in unlined water filled ponds that leaked and contaminated groundwater, and the reason why Georgia Power was incurring coal ash remediation costs was to address its unsafe, leaking coal ash ponds. R2-D2.2 p10, Table 2, p19, 58- 69.

b) the federal Environmental Protection Agency's ("EPA's") express statement that it promulgated the coal ash rule, which requires Georgia

> Power to remediate its leaking coal ash ponds to "address [] . . . groundwater contamination from the improper management of CCR in landfills and surface impoundments . . . ." (emphasis added). *Hazardous and Solid Waste Management Systems; Disposal of Coal Combustion Residuals From Electric Utilities*, 80 Fed. Reg. 21301, 21303 (April 17, 2015); and
>
> c) the costs Georgia Power is seeking to recover were incurred specifically to remediate and close certain leaking ponds deemed unsafe under EPA's and EPD's CCR regulations, and that reflect what EPA and EPD have concluded is "improper management" of toxic coal ash waste.

This Court should grant certiorari to review whether the Commission's failure to consider Georgia Power's coal ash handling practices that created the need for this clean up expenditure constitute reversible error. The Court has clear, persuasive precedent for doing so from its sister court in North Carolina in *State ex rel. Utilities Comm'n v. Stein,* 375 N.C. 870, 851 SE2d 237 (2020). Just as in this case, North Carolina Supreme Court in *Stein* grappled with whether the North Carolina Utility Commission's failure to consider a utility's imprudent coal ash

disposal constituted reversible error, and the court in *Stein* concluded that it did. As the *Stein* court explained, the North Carolina Utility Commission was

> required to consider all material facts of record…including…facts pertaining to alleged environmental violations such as non-compliance with NPDES permit conditions, unauthorized discharges, and groundwater contamination from the coal ash basins…and to incorporate its decision with respect to the nature and extent of the utilities' violations, if any, in determining the appropriate ratemaking treatment for the challenged coal ash costs."

Id. at 276-77 (emphasis added). The North Carolina Supreme Court remanded the matter to the North Carolina Utility Commission to determine if coal ash costs should be equitably allocated between the utility and its customers. *Stein* 276-77.

Here too, this Court should grant certiorari to review whether the Georgia Commission's complete failure to consider Georgia Power's imprudent coal ash disposal practices constituted reversible error. If this Court concludes that it did constitute reversible error, this Court, like the court in *Stein*, should reverse the Commission's February 6, 2020 Order and remand the matter to the Commission, so that the Commission can conduct the requisite evidentiary inquiry into whether and to what extent Georgia Power's coal ash remediation costs were incurred as a result of GPC's "'imprudent action or inaction.'" *Georgia Power Co.,* 196 Ga. App. 578, 396 S.E.2d 569 (citations omitted). Only then can the Commission properly determine whether it is "just and reasonable," within the meaning of O.C.G.A. §

46–2–25(b), to require Georgia Power's customers to pay any of GPC's remediation costs.

A copy of the single page October 25, 2021 Decision of the Court of Appeals in this case is attached hereto as Exhibit A and a copy of the Court of Appeals single page November 17, 2021 denial of Appellant's Motion For Reconsideration is attached hereto as Exhibit B.

ENUMERATION OF ERROR

The Court of Appeals erred by affirming the Superior Court and Commission decisions which, as a matter of law, implicitly hold it is "just and reasonable" within the meaning of O.C.G.A. 46-2-25(b), for existing and future Georgia Power customers to pay 100% of the coal ash cleanup costs without consideration of Georgia Power's culpability for necessitating those costs by its decades-long imprudent, unreasonable, and illegal coal ash storage and disposal.

ARGUMENT AND CITATION TO AUTHORITIES

A. Under Georgia Law, Georgia Power Can Only Recover Costs From Its Captive Customers If Those Costs Were Not The Result Of Imprudent Action Or Inaction, But Were Instead Prudently Incurred, Such That It Is Just And Reasonable To Impose Those Costs Upon Georgia Power's Customers

Georgia law provides that "[a]t any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just

and reasonable shall be upon the utility." OCGA § 46–2–25(b) (emphasis added). Thus, in a rate case:

> only costs 'prudently incurred, reasonable and not unlawful' [a]re qualified for rate recognition. Costs incurred as a result of 'imprudent action or inaction or [which] are unreasonable, excessive or unlawful are disqualified . . . .'

Georgia Power Co., 196 Ga. App. 578, 396 S.E.2d 569 (citations omitted). Particularly, "given the [vast] costs involved and the rate impact of those costs on monopoly customers . . . the utility should be held to a high standard of care in making decisions and taking actions in its planning." *Id.* at 578. "Where the risk of harm to the public and ratepayer is greater, the standard of care expected…is higher." *Id.* If there are excessive or unreasonable costs, then the "*determinative issue is not whether the decision to incur the costs was prudent, but who should bear such costs*" since the expense is "certainly more in the control of utility management than the ratepayers. Therefore, it is only appropriate that such excessive or unreasonable costs become that responsibility of the utility and not the ratepayer." *Id.* at 578-79 (emphasis added).

At issue in *Georgia Power Co.* was whether Georgia Power could recover the full costs of building the Vogtle nuclear power plant from its captive customers, or whether Georgia Power should be required to shoulder some of those construction costs itself. Similar to this case, in *Vogtle*, Georgia Power sought recovery of vast sums for costs that the utility incurred via its own control and

decisions, and that its customers otherwise could not protect themselves from. The core issue was not whether costs were and will be incurred, but who should bear those costs. *Id.* at 570, 578. In *Georgia Power Co.,* the Court affirmed the legal standard for prudency, as articulated by the Commission, and affirmed the decision of the Commission that Georgia Power should be required to carry some of the burgeoning costs of building Vogtle. *Id.* at 579, 586. The same consideration should have occurred in this case due to the billions of dollars at stake in cleaning up Georgia Power's imprudent coal ash storage and disposal areas, which the Georgia Power customers had zero control over.

B. The Commission Acted Arbitrarily And Capriciously And Committed Reversible Error When It Failed To Inquire Into, Consider, Or Address Whether Georgia Power Incurred Coal Ash Remediation Costs As A Result Of Its Imprudent Coal Ash Handling Practices, And Therefore Whether Georgia Power Should Be Required To Shoulder Some Or All Of Those Costs.

Simply put, the Commission never examined or considered whether Georgia Power's history of disposing toxic waste in waterways and unlined open ponds was imprudent, unreasonable or illegal. The Commission likewise never considered whether Georgia Power's imprudent coal ash handling practices were the reason why Georgia Power is now incurring vast coal ash remediation costs such that recovery of those costs from customers should be disallowed. O.C.G.A. § 46–2–25(b).

On appeal, the Commission failed to point to anything in the record below suggesting the Commission ever considered the issue of Georgia Power's culpability or equitable allocation of costs. To the contrary, the Commission's position before the Court of Appeals was that it was not required to "identify every argument and all evidence that it is not adopting." Brief of Appellee, Georgia Public Service Commission at 23 (emphasis added). In addition, the Commission argued on appeal that it "did not fail to consider the violations" but instead that it "did not find the allegations persuasive." *Id.*

However, Georgia's Administrative Procedure Act ("APA") requires more: to ensure an agency addresses all material issues and renders a reasoned decision based on the evidence, an agency's "final decision shall include findings of fact and conclusions of law . . . accompanied by a concise and explicit statement of the underlying facts supporting the findings." O.C.G.A. § 50-13-17. The purpose of this requirement is because, on appeal, "[i]f arbitrary and capricious action is alleged the court must determine whether a rational basis exists for the decision made" as a "question of law." *Georgia Power Co.,* 196 Ga. App. 581 (citing *Georgia Public Svc. Comm. v. Southern Bell*, 254 Ga. 244, 246, 327 S.E.2d 726 (1985)).

This well-established requirement of administrative law is common across jurisdictions, and federal law mirrors Georgia law. As the U.S. Supreme Court

explained in *Motor Vehicle Mfrs. Ass'n.*, an agency action is "arbitrary and capricious if the agency . . . entirely failed to consider an important aspect of the problem," including failure to "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 52, 103 S. Ct. 2856 (1983).[1]

As discussed further below, in this case the Commission had uncontroverted expert evidence that Georgia Power's imprudent coal ash handling practices were the cause of the coal ash remediation costs. This evidence included reports by a Georgia registered expert geologist based on Georgia Power's own data and EPA's own statements.

Georgia law required the Commission--after being confronted with clear evidence that Georgia Power's imprudent disposal practices were a likely cause for the coal ash costs--to have at least acknowledged the culpability issue, and made at least some factual inquiry into whether Georgia Power's conduct was "imprudent" and a cause of the vast coal ash remediation costs. However, the Commission did

[1] Georgia courts refer to federal precedent when resolving Georgia APA matters that are analogous to the federal APA. *See, e.g., Chattahoochee Valley Home Health Care, Inc. v. Healthmaster, Inc.*, 381 S.E.2d 56, 58 (Ga. Ct. App. 1989) (citing Supreme Court "[c]onstruing analogous federal statutory law.")

nothing of the kind, because the Commission failed to even consider the issue of culpability.

C. Federal And Georgia Law Clearly Prohibit Discharging Wastes Into Waters Of The United States, Including Georgia Groundwater, Without A Permit.

Federal and Georgia law prohibit discharging waste into federal and state waters without a permit. For example, since 1964, the Georgia Water Quality Control Act, O.C.G.A. § 12-5-20 et. seq., has required that any person who discharges pollutants into waters of the state "shall obtain a permit from the director to make such discharge." O.C.G.A. § 12-5-30. Under Georgia law, "[w]aters of the state" include "surface or subsurface water." O.C.G.A. § 12-5-22(13). Since 1979, the Georgia Hazardous Waste Management Act, O.C.G.A. § 12-8-60, et. seq., has made it illegal to store, treat, or dispose of hazardous waste in Georgia without a hazardous waste facility permit. O.C.G.A. §§ 12-8-66; 12-8-62(4); 12-8-62(11).

Since 1972, section 301 of the federal Clean Water Act, 33 U.S.C. §1251 et seq., has prohibited "the discharge of any pollutant by any person" to federal waters without a permit, 33 U.S.C. § 1311(a), such as a National Pollution Discharge Elimination System ("NPDES") permit pursuant to 33 U.S. Code § 1342, or a dredge and fill permit pursuant to 33 U.S.C. § 1344. Georgia has adopted mirroring rules, and the Environmental Protection Department ("EPD") has been delegated

authority to implement the federal Clean Water Act: discharges to federal or state waters is prohibited without an EPD permit under O.C.G.A. § 12-5-30.

D. The Uncontroverted Evidence In The Record Demonstrates That Georgia Power Imprudently And Illegally Disposed Of Toxic Coal Ash In Unlined Ponds Without Permits, Which Caused Contamination Of Waters Of The State, Including Groundwater.

Georgia Power burned coal to generate electricity at eleven coal-fired power plants. *See generally* R2-D2.2 pp52-91;[2] *see also* R2-D2.2 pp1-27.[3] Burning coal and removing the resulting pollutants produces coal ash, which includes fly ash, bottom ash, boiler slag, and flue gas desulfurization materials. Coal ash contains heavy metals such as aluminum, arsenic, boron, cobalt, iron, lithium, magnesium, selenium silicon, and sulfur. *See* R2-D2.2 p3.

Historically, Georgia Power would dump its coal ash into 16 unlined (29 total) ponds at its 11 coal-fired power plants. R2-D2.2 p10, Table 2, p19. More specifically, Georgia Power's coal ash handling practices consisted of:

- constructing and using coal ash ponds over existing streams which placed them in direct contact with groundwater (*Id*. at 62-66: Figs 1-6); and

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[2] The environmental report at R2-D2.2 pp52-98 was prepared by expert Mark Quarles, a Georgia Registered Professional Geologist. The Quarles Report is an exhibit to the direct testimony of Sierra Club's energy expert witness Rachel Wilson at R2-D2 pp74-105.

[3] Citations to the record include R1 or R2 (Record 1 or Record 2) and the page number (R1-_). Citations to sealed documents will be cited as "Sealed R1-page". Citations to documents included in the administrative record before the Public Service Commission include the corresponding Tab and PDF page number (R2-Tab p__).

constructing and using coal ash ponds without leachate collection systems. (*Id*. at 59-60, 62; R2-K2.1 pp69:13-25, 70:1-3).

- constructing and using coal ash ponds without liners, adjacent to rivers and streams, in areas with shallow groundwater table aquifers (*Id*. at 58, 68-69);

- constructing and using coal ash ponds in karst terrain, in Georgia's "most significant groundwater recharge areas" and in areas having the "highest susceptibility to groundwater pollution" (R2-D2.2 pp66-68);

Hazardous metals (e.g., arsenic, beryllium, cobalt, molybdenum, etc.) have leached out of Georgia Power's coal ash ponds and into groundwater, R2- D2.2 pp54, 80, which constitutes hazardous waste. O.C.G.A. §§ 12-8-62(9), (10).

There are no permits in the record authorizing Georgia Power to place its coal ash in surface waters such as streams and wetlands, nor to leach its coal ash constituents into groundwater. Georgia Power has never contested that it lacks any such permits, and has never asserted that it had such permits.

Georgia Power's practice of improperly storing toxic coal ash in unlined ponds has caused heavy metals and other contaminants to leach into groundwater, consistent with EPA's predictive reports from the 1980s: "Groundwater contamination is present due to the leakage of unlined surface impoundments that Georgia Power constructed […] despite the electric power industry trend of constructing lined impoundments starting in the 1970s." R2-D2.2 p89. When contaminated groundwater leaches from unlined CCR ponds and discharges into a receiving stream, it can impact humans, fish and other animals. *Id*. at 54. Potential

for human exposure to coal ash exists through contact or ingestion of the contaminated surface or groundwater or by consuming fish that bioaccumulate coal ash contaminants. *Id*.

EPA and utilities have been aware of the risks of leaking unlined coal ash ponds since the 1970s, but not all utilities—including Georgia Power—took actions to address the issue before being forced to do so by EPA's 2015 Coal Combustion Residuals Rule ("CCR Rule"). For example, EPA documented the risks of leaking coal ash ponds in the 1980s based on industry data from the mid-1970s. R2-D2.2 p7. The EPA reports from the 1980s concluded:

- "The primary concern regarding the disposal of wastes from coal-fired power plants is the potential for waste leachate to cause groundwater contamination."

- "Fly ash, bottom ash, boiler slag, and FGD wastes warranted continued regulation as a solid waste under RCRA Subtitle D because of the potential to contaminate groundwater and the damage it might cause."

Id. at 8.

E. It Is Undisputed That EPA And The Georgia EPD Adopted Coal Combustion Residuals ("CCR" Or "Coal Ash") Regulations To Rectify Environmental Harm Caused By Utilities' "Improper" Handling Of Their Toxic Coal Ash Waste.

In 2015, EPA promulgated the CCR Rule in an effort to address the improper and often illegal coal ash handling practices of utilities. *See* 80 Fed. Reg. 21301, 21303 (April 17, 2015). EPA expressly stated when it adopted the CCR Rule that it "addresses the risks from . . . *groundwater contamination from the improper*

management of CCR in landfills and surface impoundments and fugitive dust emissions." 80 Fed. Reg. at 21303 (emphasis added). The CCR Rule requires closure of certain CCR ponds and landfills by a certain date,[4] while also establishing location restrictions, groundwater monitoring, closure requirements, recordkeeping, reporting, etc.… *See* 80 Fed. Reg. at 21301.

Georgia EPD, thereafter, adopted a matching state CCR Rule and in 2019 EPD was delegated authority by EPA to implement their program in lieu of the federal program. *See* Georgia: Approval of State Coal Combustion Residuals Permit Program, 85 Fed. Reg. 1269 (Jan. 10, 2020). Like the federal CCR rule, the Georgia CCR rule regulates CCR ponds and requires the submission of a permit application to the Georgia EPD detailing closure plans for all unlined coal ash ponds. Ga. Comp. R. & Regs Rule 391-3-4-.10, *et seq*. Georgia EPD is responsible for determining and approving the appropriate closure method of the CCR pond and issuing closure permits. Ga. Comp. R. & Regs Rule 391-3-4-.10(9).

F. Georgia Power Is Seeking An Initial $525,000,000—Of A Total That in 2019 Was $7.6 Billion --From Its Captive Customers Expressly To Remediate Its Imprudent, Improper, Leaking Coal Ash Ponds.

[4] The date for closure of certain CCR impoundments was amended. It was originally April 2019, but in 2018 it was extended to October 31, 2020 (*see* 83 Fed. Reg. 36435 (July 30, 2018 rule)). The current deadline is April 11, 2021 (*see* 85 Fed. Reg. 53516 (Aug. 28, 2020).

Pursuant to the Georgia CCR regulations, Georgia Power filed applications for CCR closure permits with Georgia EPD in 2018. R2-D2.2 p8. EPD's permitting process is the administrative mechanism through which EPD will determine how GPC will close its 29 CCR ponds, ranging from complete excavation, removal and placement of the coal ash into lined landfills or capping the coal ash in place. Ga. Comp. R. & Regs Rule 391-3-4-.10(9). EPD must consider a range of factors, including the type of terrain surrounding the CCR pond, whether the coal ash is within five feet of the aquifer, and the CCR pond's structural soundness. *Id*.

On June 28, 2019, Georgia Power filed its 2019 Rate Case requesting a total rate increase of $942 million for 2020-2022. R2-V p181. Of that, Georgia Power requested its first installment of coal ash closure costs of $525 million to be collected over three-years: $158 million in 2020, $140 million in 2021 and $227 million in 2022. *Id*. at pp 181, 184. The total coal ash closure costs were estimated during the 2019 rate case to be $7.6 Billion.

G. The Commission Adopted The Settlement That Georgia Power Agreed To With Other Parties And Never Considered Georgia Power's Culpability For Its Imprudent Coal Ash Disposal Practices.

In the proceedings before the Commission, only Sierra Club raised the issue of whether it was just and reasonable to pass the coal ash costs on to customers and whether those costs were prudently incurred. Only Sierra Club introduced evidence that Georgia Power knew or should have known for decades that it was improperly

disposing of its coal ash; was illegally discharging to and contaminating groundwater and surface water; and should not recover remediation costs for that reason alone. Moreover, only Sierra Club argued that Georgia Power's proposed cap-in-place coal ash closure plans, which Georgia Power had already begun implementing without EPD permits, would not comply with state or federal law, and therefore all coal ash costs should be denied.[5] R2-D2 pp77-105. No other party presented any evidence concerning Georgia Power's culpability for its illegal coal ash handling practices.

Georgia Power and some Intervenors -- but not the Sierra Club –entered into a settlement agreement resolving some of the issues in the 2019 Rate Case, which they presented to the Commission. R2-B3. Regarding recovery of coal ash costs the settlement agreed that:

> 2. The revenue requirement amount related to ash pond Asset Retirement Obligations shall be collected through the ECCR tariff effective January 1, 2020.
>
> 5. Environmental Compliance Cost Recovery tariff ("ECCR") shall include the cost for compliance with Coal Combustion Residual Asset Retirement Obligations ("CCR ARO") …. For purposes of settlement, the forecasted contingency for CCR AROs and traditional ECCR has been removed from the annual expenditure projections…Effective January 1, 2020, it is estimated that the ECCR tariff will be adjusted to collect an additional $324 million, an estimated $115 million

[5] Sierra Club would have further expanded the record on these issues, however, intervenors are not allowed to conduct discovery in Commission cases. O.C.G.A. § 46-2-57(a).

> effective January 1, 2021, and $180 million effective January 1, 2022…The projection of CCR ARO cost will be updated in 2020 and 2021 through compliance filings to set the actual ECCR tariff rates for 2021 and 2022.

R2-B3 p2 ¶¶ 2,5.

The Commission then issued a "Short Order Adopting Settlement Agreement as Modified" ("Short Order"), authorizing Georgia Power to recover $525 million for coal ash costs to be paid solely by Georgia Power's customers. R2-F3 p11 ¶19. The Commission summarily concluded that "the rates resulting from the Settlement Agreement are fair, just and reasonable." *Id*. at 13 ¶3. In its Short Order, the Commission stated it would "issue a more detailed order…further explaining its decisions, findings and conclusions." *Id*. at 14.[6]

On February 6, 2020, the Commission issued its "Order Adopting Settlement Agreement" ("Final Decision"). R2-K3. The Commission made the following findings related to the coal ash costs in its Final Decision:

- "ECCR shall include the cost for compliance with CCR ARO…For purposes of settlement, the forecasted contingency for CCR AROs and

[6] Sierra Club filed a motion for reconsideration of the Short Order arguing *inter alia* that Georgia Power failed to prove that the coal ash costs were just, reasonable, and prudently incurred because they were caused by Georgia Power's imprudent and illegal coal ash storage and disposal. On February 4, 2020, the Commission voted to deny the motion and on February 21, 2020, issued an Order stating "The issues raised in the Motion for Reconsideration were already considered and adjudicated in the underlying proceeding" without ever addressing the issue of Georgia Power's culpability due to imprudent coal ash disposal practices. R2-J3 p12; R2-N3, p2.

traditional ECCR has been removed from the annual expenditure projections…Effective January 1, 2020, it was estimated that the ECCR Tariff would be adjusted to collect an additional $324 million, an estimated $115 million effective January 1, 2021 and $180 million effective January 1, 2022." *Id*. at p.7 ¶6.

- "Sierra Club recommended that the Commission deny the Company's request to recover $525 million from its ratepayers for its CCR costs stating that Georgia Power failed to demonstrate that its costs are just, reasonable, and prudent. Sierra Club stated that the Company failed to provide a cost accounting, cost breakdown or list of line item expenses breaking down how or when the $525 million will be spent. Sierra Club also asserted that the CCR costs should be disallowed as those future costs are uncertain. Since the Georgia EPD has yet to approve Georgia Power's CCR closure plants, Sierra Club argued that the Company is attempting to recover, from ratepayers, costs that are indefinite, uncertain and could change." R2-K3 p8 ¶6

- "This Commission has carefully considered the evidence and testimony presented on these issues and finds that it is just and reasonable for Georgia Power to recover CCR ARO compliance costs provided for in the Proposed Agreement." *Id*.

The Commission made one Conclusion of Law related to the coal ash costs: "[t]he rates resulting from the Settlement Agreement as Modified are fair, just and reasonable. *Id*. at 27 ¶3.

None of the Commission's Orders ever address, in findings of fact, conclusions of law, or a concise statement of its reasoning, O.C.G.A. § 50-13-17, the most important issue Sierra Club raised: that Georgia Power's coal ash costs were incurred as a result of Georgia Power's imprudent and illegal conduct in storing and disposing of its toxic coal ash, and that recovery of 100% of those costs

from Georgia Power's customers was unjust and unreasonable. Indeed, nowhere in the record below is there any indication that the Commission ever considered, discussed, or even reviewed the evidence of Georgia Power's culpability in incurring the coal ash costs due to decades of imprudent and illegal coal ash storage and disposal. O.C.G.A. § 46–2–25(b).

Tellingly, as noted above, before the Court of Appeals, the Commission argued that it simply need not "identify every argument and all evidence that it is not adopting." Brief of Appellee, Georgia Public Service Commission at 23. Instead, the Commission's counsel offered the post hoc justification that the "Commission did not fail to consider the violations; instead, the Commission did not find the allegations persuasive." *Id.* However, Georgia law requires more from the Commission.

H. The Commission's Failure To Consider Georgia Power's Imprudent And Illegal Coal Ash Disposal Practices When It Allowed Georgia Power To Recover Coal Ash Remediation Costs Is Inconsistent With Georgia Law

It is the Commission's duty to undertake an analysis to determine "who should bear [the] costs" and if those costs were "prudently incurred, reasonable and not unlawful." *Georgia Power Co.,* 196 Ga. App. 578-79, 396 S.E.2d 569 (citations omitted). In *Vogtle*, Georgia Power was seeking to recover costs associated with construction of the initial units at the Vogtle nuclear power plant, for which Georgia Power used a "'design-build' or 'fast track' method; i.e., no full project design

existed as the project began but was being prepared contemporaneously" as the project proceeded. *Id.,* 196 Ga. App., 573-74, 396 S.E.2d 566-67. The Vogtle plant began with an estimated cost in 1971 of $660 million; by 1979 it was $3.4 billion; by 1985 it was $8.4 billion; and by 1986, $8.4 billion. *Id.*

In *Vogtle*, the Commission retained outside experts specifically to "examine the prudence of the [Georgia Power's] management of the project:" the expert spent two years "audit[ing] the project management both prospectively and retrospectively," which included extensive data requests and onsite inspections. *Id.,* 196 Ga. App., 574-75, 396 S.E.2d 567-68. The Commission held over 42 days of hearings over five months, producing over 12,000 pages of transcripts and 502 exhibits. *Id.,* 196 Ga. App., 573-74, 396 S.E.2d 566-67. Ultimately, the Commission allowed some recovery of Georgia Power's costs from its customers, but denied recovery of hundreds of millions of dollars in costs incurred, concluding that the costs were not just, reasonable, and prudently incurred. On appeal by Georgia Power, the court affirmed the disallowance of disallowed costs on the grounds that they were "the result of the Company's imprudent management" for which "the utility was ultimately responsible." *Id.,* 196 Ga. App. 586, 396 S.E.2d 575.

The case at hand involves sums that are equivalent in scale to the costs Georgia Power was seeking to collect in *Vogtle*—$525,000,000 in Georgia Power's initial filing, but with an expected total of $7.6 billion in 2019. Similar to *Vogtle*,

Georgia Power is approaching its coal ash remediation obligations without a final plan in place, reflected in final permits specifying the remediation actions required. R2-V p147:21-23. Instead, Georgia Power is implementing remediation plans to cap coal ash ponds in place, for example, rather than excavating and landfilling the coal ash in lined landfills, as may ultimately be required. R2-D2.2 pp53, 85. And, like *Vogtle,* Georgia Power's costs are likely to increase. However, this is where the similarities between *Vogtle* and the case at hand end.

Unlike in *Vogtle*, the Commission in this case never examined whether Georgia Power's actions that led to it incurring hundreds of millions of dollars in coal ash remediation costs were prudent. The Commission did not hire an expert to examine whether Georgia Power's actions that led it to incur remediation costs were prudent. On the contrary, the Commission seemingly ignored the only expert opinion in the record on the issue, which concluded that Georgia Power's operation of coal ash ponds were unsafe, leaking, and illegally contaminating groundwater without a permit. These actions caused Georgia Power to incur billions of dollars in remediation costs. The Commission never even addressed these issues in any of its Orders. Instead, the Commission simply failed to examine whether Georgia Power's underlying actions, which resulted in its incurring billions of dollars in remediation costs, were prudent.

The Commission's failure to consider the issue of Georgia Power's imprudent coal ash disposal constitutes reversible error because the Commission "entirely failed to consider an important aspect of the problem," and its failure to address the issue anywhere in its Orders constitutes a failure to "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n*. Georgia's APA required the Commission to address all material issues and render a decision based on the evidence, with "findings of fact and conclusions of law . . . accompanied by a concise and explicit statement of the underlying facts supporting the findings." O.C.G.A. § 50-13-17. In this case, the Commission never did so.

Like the North Carolina Supreme Court in *Stein*, this Court should grant certiorari and reverse and remand to the Commission so the Commission can undertake an evidentiary inquiry and render a decision concerning whether Georgia Power acted imprudently in its disposal of coal ash such that it should be required to shoulder some of its coal ash remediation costs. As in *Stein*, the Court should provide direction to the Commission to

> consider all material facts of record…including…facts pertaining to alleged environmental violations such as non-compliance with NPDES permit conditions, unauthorized discharges, and groundwater contamination from the coal ash basins…and to incorporate its decision with respect to the nature and extent of the utilities' violations, if any,

> in determining the appropriate ratemaking treatment for the challenged coal ash costs.

Id. at 276-77 (emphasis added).

CONCLUSION

For the foregoing reasons the Supreme Court of Georgia should GRANT this Petition and issue the Writ of Certiorari to review the decision of the Court of Appeals in this case.

Respectfully submitted this 6th day of December 2021.

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SECOND DIVISION
MILLER, P. J.,
HODGES and PIPKIN, JJ.

October 25, 2021

NOT TO BE OFFICIALLY REPORTED

In the Court of Appeals of Georgia

A21A1129. SIERRA CLUB, INC. v. GEORGIA PUBLIC SERVICE COMMISSION et al.

PIPKIN, Judge.

In this case, the following circumstances exist and are dispositive of the appeal:

(1) The evidence supports the judgment;

(2) No reversible error of law appears, and an opinion would have no precedential value;

(3) The judgment of the court below adequately explains the decision; and

(4) The issues are controlled adversely to the appellant for the reasons and authority given in the appellees' briefs.

The judgment of the court below therefore is affirmed in accordance with Court of Appeals Rule 36.

Judgment affirmed. Miller, P. J., and Hodges, J., concur.

EXHIBIT
A

Court of Appeals of the State of Georgia

ATLANTA, November 17, 2021

The Court of Appeals hereby passes the following order

A21A1129. SIERRA CLUB, INC. v. GEORGIA PUBLIC SERVICE COMMISSION et al.

Upon consideration of the APPELLANT'S Motion for Reconsideration in the above styled case, it is ordered that the motion is hereby DENIED.

Court of Appeals of the State of Georgia
Clerk's Office, Atlanta, November 17, 2021.

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Stephen E. Castlen, *Clerk.*

EXHIBIT
B

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing *PETITION FOR WRIT OF CERTIORARI* to Respondent and Intervenor-Respondent via their attorneys, in a .pdf format sent via email. I further certify that there is a prior agreement with Respondents to allow documents in a .pdf format sent via email to suffice for service.

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SO CERTIFIED this 6th day of December 2021.

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